United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEWIS E. JOHNSON, Appellant, v. THOMAS SARD, D. C. BOARD OF PAROLE, ET AL., Appellee.	)	No. 22502

Appeal From the United States District Court

For The District of Columbia

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(Appointed by this Court)

Of Counsel:

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March 31, 1969

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QUESTIONS PRESENTED

(1) Does D. C. Code §24-204 permit appellee to hold appellant in custody for a period greater than the maximum sentence imposed by the trial court?

(2) If so, is D. C. Code §24-204, as applied in this case, unconstitutional?

* * *

[This case was previously before the Court on a show cause order issued December 31, 1968. After consideration of appellee's answer to the show cause order, Judges Wright and Robinson discharged the show cause order and ordered briefing on the issue of credit for time spent on parole.]

UNITED STATES COURT OF APPEALS

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LEWIS E. JOHNSON, Appellant, v. THOMAS SARD, D. C. BOARD OF PAROLE, ET AL., Appellee.	)	No. 22502

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant filed a Petition for a Writ of Habeas Corpus with the United States District Court for the District of Columbia on October 17, 1968. This petition was dismissed on the grounds of lack of jurisdiction. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291.

STATEMENT OF FACTS

Appellant was convicted of housebreaking and larceny and, on June 11, 1953, was "committed to the custody of the Attorney General for imprisonment for a period of four (4) to twelve (12) years." (Crim. No. 380-53). By the terms of the Judgment, appellant's maximum term of custody would expire on June 10, 1965.

On October 16, 1958, appellant was released from prison on parole. He remained in the custody of the Attorney General subject to the following conditions, among others (See Appendix A):

(1) To report monthly to his parole officer;

(2) To maintain steady employment;

(3) Not to marry without permission of his parole officer;

(4) Not to change residence without permission of his parole officer;

(5) Not to consume alcoholic beverages;

(6) Not to visit places where narcotics or marihuana are sold or given away;

(7) Not to possess firearms;

(8) Not to associate with persons having a "bad reputation".

Appellant remained on parole in the custody of the Attorney General until October 31, 1961, when his parole was revoked, apparently for failure to maintain a steady job and for using an automobile without permission.[1/] He was returned to prison.

On July 1, 1965 appellant was again released on parole under the conditions set forth above.

On July 22, 1968, appellant was returned to prison on a complaint that he:

1/ Appellant contended that the use of a car was necessary for his employment and that work in the construction field was by its nature irregular. He admitted his use of an automobile without permission of his parole officer.

(1) ". . . failed to refrain from drinking alcoholic beverages as the undersigned detected the odor of alcohol during a visit . . . ."

(2) ". . . failed to make diligent effort to maintain steady employment and support his family . . . ."

(3) ". . . failed to support his family . . . ."

(4) ". . . failed to report to the parole officer . . . ."

(5) ". . . changed his place of residence without approval and his present residence is unknown . . . ."

Although appellant was at all times in the custody of the Attorney General (except from March 4, 1966 until July 22, 1968, which time appellant is not claiming as credit)[2/], under D. C. Code §24-206, as it has been interpreted by the Parole Board and the courts[3/], no credit for time spent on parole is granted if parole is revoked and the parolee returned to

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2/ A warrant was issued on March 8, 1966. Appellant was not returned to jail until July 22, 1968. This period of a little over two years is not claimed as "custody" within the meaning of D. C. Code §§ 24-204 and 24-206.

3/ See Bates v. Rivers, 116 U.S.App. D.C. 306, 323 F.2d 311 (1963). D.C. Code § 24-206 provides in part as follows:

> "When a prisoner has been retaken upon a warrant issued by the Board of Parole, he shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board. At such hearing he may be represented by counsel. The Board may then, or at any time in its discretion, terminate the parole or modify the terms and conditions thereof. If the order of parole shall be revoked, the prisoner, unless subsequently reparoled, shall serve the remainder of the sentence originally imposed less any commutation for good conduct which may be earned by him after his return to custody. For the purpose of computing commutation for good conduct, the remainder of the sentence originally imposed shall be considered as a new sentence. The time a prisoner was on parole shall not be taken into account to diminish the time for which he was sentenced."

prison. As shown in Appendix B, appellant will spend twelve years in prison (less mandatory time off for good behavior) and 15 years 4 months in the custody of the Attorney General. The maximum sentence imposed by the trial court was twelve years, from June 11, 1953, "in the custody. . . of the Attorney General."

On October 17, 1968 appellant filed a petition for a writ of habeas corpus, or, in the alternative, a request for declaratory judgment in the District Court for the District of Columbia seeking release from custody. He contended that his detention was unlawful as being "cruel and unusual punishment." His petition was dismissed with a reference to Ahrens v. Clark, 335 U. S. 188 (1948). The trial court evidently did not consider the request as a motion pursuant to 28 U.S.C. §2255, or the request for declaratory judgment.

Appellant appealed the dismissal. On December 31, 1968, the Court[4/] ordered appellee to show cause why appellant should not be released or why the case should not be remanded to the District Court for a hearing. After reply by appellee, the Court[5/], on February 19, 1969, discharged the show cause order and asked for full briefing on the issue of credit for time spent on parole.

4/ Bazelon, C. J. and Fahy, J.

5/ Wright and Robinson, J. J.

STATUTES

"(a) Whenever it shall appear to the Board of Parole that there is a reasonable probability that a prisoner will live and remain at liberty without violating the law, that his release is not incompatible with the welfare of society, and that he has served the minimum sentence imposed or the prescribed portion of his sentence, as the case may be, the Board may authorize his release on parole upon such terms and conditions as the Board shall from time to time prescribe. While on parole, a prisoner shall remain in the legal custody and under the control of the Attorney General of the United States or his authorized representative until the expiration of the maximum of the term or terms specified in his sentence without regard to good time allowance.

"(b) Notwithstanding the provisions of subsection (a) of this section, the Board of Parole may, subject to the approval of the Board of Commissioners of the District of Columbia, promulgate rules and regulations under which the Board of Parole, in its discretion, may discharge a parolee from supervision prior to the expiration of the maximum term or terms for which he was sentenced." D. C. Code §24-204 (1967)

* * *

When a prisoner has been retaken upon a warrant issued by the Board of Parole, he shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board. At such hearing he may be represented by counsel. The Board may then, or at any time in its discretion, terminate the parole or modify the terms and conditions thereof. If the order of parole shall be revoked, the prisoner, unless subsequently reparoled, shall serve the remainder of the sentence originally imposed less any commutation for good conduct which may be earned by him after his return to custody. For the purpose of computing commutation for good conduct, the remainder of the sentence originally imposed shall be considered as a new sentence. The time a prisoner was on parole shall not be taken into account to diminish the time for which he was sentenced.

"In the event a prisoner is confined in, or as a parolee is returned to a penal or correctional institution other than a penal or correctional institution of the District of Columbia, the Board of Parole created by section 723a of title 18, U. S. Code, shall have and exercise the same power and authority as the Board of Parole of the District of Columbia had the prisoner been confined in or returned to a penal or correctional institution of the District of Columbia." D. C. Code §24-206 (1967)

SUMMARY OF ARGUMENT

This case presents the question whether D. C. Code §24-206 compels a technical parole violator to be held in custody for a period of time in excess of the maximum sentence which he received, and, if answered in the affirmative, whether such statute is constitutional

D. C. Code §24-206 is fairly subject to two interpretations: (1) that a parole violator receives no credit for the time spent in custody on parole, and (2) that a parole violator may not receive "good time" while on parole.

The former interpretation raises substantial constitutional questions which should be avoided by adopting the latter interpretation.

Denial of credit for time spent on parole has resulted in the imposition of almost three and one-half years imprisonment for the breach of several parole conditions none of which were criminal. Three and one-half years imprisonment for the violation of several non-criminal restrictions constitutes cruel and unusual punishment in violation of the Eighth Amendment to the Constitution.

Appellant has been administratively sentenced to imprisonment without the protection of a trial and has thus been deprived of his liberty without due process of law.

The application of §24-206 unfairly discriminates between two parolees who violate the same restriction at different times. The longer a parolee remains on parole, the greater the penalty for the same violation. This unjustified discrimination fails to accord appellant the equal protection of the laws.

I. SECTION 24-20o OF THE D. C. CODE MAY NOT BE CONSTRUED TO EXTEND APPELLANT'S CUSTODY BEYOND THAT IMPOSED BY THE TRIAL COURT.

On June 11, 1953 appellant was committed "to the custody of the Attorney General" for a term of four (4) to twelve (12) years. If appellant spent the maximum term of his sentence in prison, he would have been released on June 10, 1965. However, appellant spent three years on parole from October 16, 1958 to October 31, 1968. He was returned to prison at that time for violating the terms of his parole. He was re-released on July 1, 1965 and his parole was revoked on March 4, 1966. He was not returned to prison until July 22, 1968. As the Court will note, he has spent 3 years four months on parole, and if he serves the maximum length of his sentence in jail, he will have also spent twelve (12) years in jail.

It is appellant's contention that the time spent on parole should be credited against appellant's 12 year maximum sentence.

A. Time Spent On Parole Is Time Spent In Custody.

The circumstances surrounding parole permit no other conclusion but that it is custody.

Parole is, in effect, just one segment of the overall spectrum of custody which may include solitary confinement with reduced diet,

"normal" imprisonment, trusteeship, work release, parole, probation, examination in a mental hospital and variations of the foregoing.

"Not only are a parolee's civil rights curtailed, but his every day life is closely supervised and regulated. The parole board must approve the job a parolee takes as well as any subsequent occupational changes. Parolees are severely limited in their mobility, and their residences are generally under the control of the parole board. A parolee may not marry without the consent of the board. Usually he is forbidden to drink." Comment, A la Recherche du Temps Perdu: The Constitutionality of Denial of Credit on Revocation of Parole, 35 U. Chi L. Rev. 762, 765-6 (1968). C. Newman in his Source Book on Probation, Parole and Pardon (1964) states that:

> "Parole is not, as often assumed, an exercise of executive clemency which permits complete return to normal society; it is a period of servitude under supervision just as is the time spent in prison." (Emphasis supplied) (p. 236)

The courts have clearly recognized that the restraints imposed on a parolee are real and substantial.

In Jones v. Cunningham, 371 U.S. 236, 242, 243 (1963), the Supreme Court stated that ". . . in fact, as well as in theory, the custody and control of the Parole Board involve significant restraints on petitioner's liberty because of his conviction . . . ." and noted that a parolee was "confined ... to a particular ... house and job, ... admonished to keep good company and ... live a clean, honest and temperate life."

In Anderson v. Corall, 263 U.S. 193 (1923), the Supreme Court said:

> "Mere lapse of time, without imprisonment or other restraint contemplated by the law, does not constitute service of sentence . . . While on parole the convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term . . . While this is an amelioration of punishment, it is, in legal effect, imprisonment." (p. 196) (Emphasis supplied)

The most succinct expression of this principle was the court's statement in Woods v. Steiner, 207 F.Supp. 945, 951 (D.Md. 1962), that "Parole is an extension of the prison walls . . . ."[6/]

This conclusion is supported by D. C. Code §24-204 which states:

> "While on parole, a prisoner shall remain in the legal custody and under the control of the Attorney General of the United States or his authorized representative until the expiration of the maximum of the term or terms specified in his sentence without regard to good time allowance."

If as contended above, time on parole is time spent in "custody", the facts clearly show that appellant has spent more time in custody than the maximum provided under the terms of the Judgment and Commitment.

B. D. C. Code §24-206 Is Subject To Two Interpretations.

The starting point in determining appellant's sentence is, of course, the Judgment and Commitment. In this case the commitment pro-

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6/ See also McCoy v. Harris, 108 Utah 407, 414, 160 P.2d 721, 722 (1945); Hyser v. Reed, 115 U.S. App. D.C. 254, 318 F.2d 225, 240 (1963).

vided as follows:

> "It is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) to twelve (12) years."

This sentence could be subject to two interpretations. First that the defendant was to be imprisoned for 4 to 12 years. Second, that the defendant was to be placed in the custody of the Attorney General for a period of 4 to 12 years and that the purpose of said custody is imprisonment.

Appellant submits that the latter construction is the appropriate one. The Court did not intend, nor indeed could it legally place the defendant in the custody of the Attorney General forever. 7/ Accordingly, the specific period of 4 to 12 years must define and limit the <u>period of custody</u> by the Attorney General. The phrase "for imprisonment" is, of course, also limited by the term 4 to 12 years. Such a construction is sound and logical and would obviously control in the absence of any further statutory provision.

7/ Yet if appellee's theory is accepted, a person sentenced to 5 to 15 years could theoretically remain under the control of the Attorney General for over 100 years. If paroled at the end of five years, his parole could be revoked 9 1/2 years later. He would then have ten years more to serve. If he were immediately paroled, that parole could be revoked in 9 1/2 years and the defendant would still have 10 years (less one day) to serve. Through this theoretical chain a man could remain under the custody and control of the Attorney General for life, even though he committed only <u>one</u> crime the maximum sentence for which was 15 years.

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However, Congress has provided a procedure by which the District of Columbia Board of Parole may authorize a prisoner's "release [from prison] on parole upon such terms and conditions as the Board shall from time to time impose." D.C.C. §24-204. The statute specifically states that a prisoner on parole is still under the "legal custody and under the control of the Attorney General . . . ." D.C.C. §24-204.

The difficulty arises when a prisoner on parole violates one of the terms and conditions of his parole. At this time the Parole Board may revoke his parole and return him to prison. The law provides that "The time a prisoner was on parole shall not be taken into account to diminish the time for which he was sentenced." D.C.C. §24-206.

Appellee contends that this provision requires appellant to remain in prison for an additional period equal to the time he was on parole. This contention is supported by this Court's two to one decision in Bates v. Rivers, 116 U.S.App.D.C. 306, 323 F.2d 311 (1963). Howerton v. Rivers, 117 U.S.App.D.C. 110, 326 F.2d 653 (1963), supports this contention in dicta only. See also, Jones v. Clemmer, 82 U.S.App.D.C. 288, 163 F.2d 852 (1947).

The dissenting judge in Bates rejected appellee's reading of the statute and reasoned that this language, read in conjunction with the rest of §24-206, was designed to prevent a prisoner from receiving "statutory

good time" [8] while on parole, i.e., in the words of the statute, no diminishment of the sentence because of time spent on parole.

Certainly such an interpretation is a permissible one. Congress could reasonably have removed a "grace" granted prisoners for time spent in prison from prisoners on parole. The alternative, on the other hand, extends the prisoner's sentence for the time spent on parole. Not only could this lead to lifetime custody (see n. 7, supra), but it makes the penalty for a parole violation increase each day the prisoner is on parole. Thus, as in this case, the penalty for infraction of parole conditions - not amounting to even the most minor crime - is many years in prison.

"The essential distinction between simple revocation and revocation accompanied by denial of credit is the difference between the mode of custody and the duration of custody: while revocation merely provides that a prisoner's sentence be spent in prison, denial of credit actually extends the period of custody beyond that originally imposed." [9]

The courts have recently begun to recognize that the denial of credit for technical violations of parole raises substantial constitutional questions. Gibbs v. Blackwell, 354 F.2d 469 (5th Cir. 1965). These questions are discussed in Parts II, III and IV of this brief.

8/ 18 U.S.C. §4161 (1964)

9/ 35 U. Chi. L. Rev. 762, 763 (1968)

C. D. C. Code §24-206 Should Be Construed To Avoid Severe Constitutional Problems.

If a statute is subject to two different interpretations, and one raises severe constitutional problems, then the courts will adopt the other construction in order to avoid casting doubt on the entire statute. The Supreme Court stated the rule in Dennis v. United States, 341 U.S. 494, 501 (1951), when it said:

> "We must bear in mind that it is the duty of the federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution."

This rule was made even more plain by the Supreme Court in American Communications Ass'n. v. Douds, 339 U.S. 382, 407 (1950), which held that when it is within the power and duty of the Court to construe a statute so as to avoid the danger of unconstitutionality, it must do so.

Accordingly, this Court should adopt appellant's construction of the statute to avoid the substantial constitutional question otherwise presented.

II. ADDITIONAL IMPRISONMENT FOR VIOLATION OF SEVERAL PAROLE CONDITIONS (NONE OF WHICH CONSTITUTES A CRIME) CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE CONSTITUTION.

If the Court can see no other logical method of construing §24-206 than did the majority in Bates v. Rivers, the Court must then view §24-206 as violative of the Eighth Amendment.

The major discussion of the Eighth Amendment prohibition against cruel and unusual punishment is found in Weems v. United States, 217 U.S. 349 (1910).[10/] There plaintiff had been sentenced to 15 years of hard labor for falsifying a public document. In reversing his conviction, the Supreme Court attacked both the statute and the length of sentence. The Court quoted with implicit approval the Massachusetts Supreme Court statement that ". . . punishment in the state prison for a long term of years might be so disproportionate to the offense as to constitute cruel and unusual punishment." 217 U.S. at 368. The Supreme Court was not willing to confine the phrase "cruel and unusual punishment" to torture by the rack. It said in Weems, "we cannot think that the possibility of a coercive cruelty being exercised through other punishments was overlooked . . . Cruelty might become an instrument of tyranny; of zeal for a purpose either honest or sinister." The Court argued against a narrow construction of the Eighth Amendment, saying that time works changes and brings into existence new conditions and purposes.

The position that the Eighth Amendment's meaning would not be confined to prohibitions existing in 1787 was confirmed by the Court in Trop v. Dulles, 356 U.S. 86, 100 (1958):

10/ For a recent discussion, see the note in 35 U. Chi. L. Rev. 762 (1968), A La Recherche de Temps Perdu: The Constitutionality of Denial of Credit on Revocation of Parole, where the author challenges 18 U.S.C. §4205 and, implicitly, D.C.C. §24-206, as being unconstitutional on due process and Eighth Amendment grounds.

> "The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice . . . The basic concept underlining the Eighth Amendment is nothing less than the dignity of man. While the state had the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment, even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."

This Court in Watson v. United States, No. 21, 186 (D. C. Cir., Dec. 13, 1968) reviewed the scope of the Eighth Amendment in a case involving possession of narcotics by a narcotic addict. There, the jail sentence under attack was ten years, twice as long as maximum prison lengths for such crimes as perjury, assault with a dangerous weapon or blackmail. In discussing the rationale for such a long sentence for mere possession (viz: that possession of narcotics is hard to deter, so it therefore requires a harsh sentence), Chief Judge Bazelon spoke for the Court in saying:

> ". . . that rationale, while entitled to consideration, cannot support a penalty 'out of all proportion to the offense' or to the capability of the offender."

The Court held that the ten year sentence for possession was cruel and unusual punishment in violation of the Eighth Amendment.

The Watson decision relied on Weems in comparing the relative nature of the offense punished with the length of sentence. The Court said that with the opinion in Robinson v. California, 370 U.S. 660 (1962), the few strands still tying Weems to prohibiting only uncivilized modes of punishment were severed. The Watson Court said:

> "We recognize that the seriousness of an offense and the necessary or appropriate amount of punishment are primarily matters for resolution by the legislature. But that is equally true of the question of what should be punished in the first place. The 'evolving standards of decency that mark the progress of a maturing society,' which underly the eighth amendment, are not readily confined within the artificial alternatives of impermissible modes of punishment or unpunishable offense."

Several other courts have reviewed the length of the sentences themselves, and found them unconstitutional. 11/

11/ E.g., Nowling v. State, 151 Fla. 584, 10 So. 2d 130 (1942) (three years' confinement for concealing one gallon of moonshine whiskey is cruel and unusual punishment); State ex. rel. Garvey v. Whitaker, 48 La. Ann. 527, 19 So. 457 (1896) (nearly six years' confinement for 72 offenses of destroying public plants is cruel and unusual punishment); People v. Murray, 72 Mich. 10, 40 N.W. 29 (1888) (confinement beyond life expectancy of accused is cruel and unusual punishment); State v. Blackmon, 260 N.C. 352, 132 S.E. 2d 880 (1963) (20-30 years' confinement for possession of burglary tools is cruel and unusual punishment); State v. Driver, 78 N.C. 423 (1878) (five years' confinement for assault on wife with a switch and by kicking is cruel and unusual punishment); Stephens v. State, 72 Okla. Crim. 349, 121, P. 2d 326 (1942) (21 months' confinement under habitual criminal statute where offense was inadvertent bigamy is cruel and unusual punishment); State v. Ross, 55 Ore. 450, 104 Pac. 596 (1909) (imprisonment for 288,246 days, conditioned on failure to pay fine, for embezzling $576,853.74 is cruel and unusual punishment); State v. Kimbrough, 212 S.C. 348, 46 S.E. 2d 273 (1948) (30 years' confinement for first offense of burglary is cruel and unusual punishment).

Thus, it appears that if the length of a sentence imposed where a person has been convicted of crime may violate the Eighth Amendment, the administrative imposition of over three years imprisonment for several technical parole violations, none of which constituted a crime, may result in cruel and unusual punishment in violation of the Eighth Amendment.

In Gibbs v. Blackwell, 354 F.2d 469, 471 (5th Cir. 1965) the Fifth Circuit specifically recognized that the denial of credit for time spent on parole "raises serious constitutional questions." In that case, the Court felt that it did not have an adequate record to decide these questions and, accordingly, remanded the case to the trial court to develop such a record. Unfortunately, there does not appear to be any further judicial determination in that case.

Here the facts are clear. The violations alleged are all non-criminal in nature. The result of these violations was almost three and one-half years additional imprisonment. Appellant respectfully submits that on these facts the punishment imposed was unconstitutional.

Cases Under 18-4205 of the United States Code

D.C.C. §24-206 is somewhat similar in language and application to 18 U.S.C. §4205. That statute reads as follows:

> "A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve."

A holding that §24-206 is unconstitutional may cast doubt on the constitutionality of 18 U.S.C. §4205, although the Court in Howerton v. Rivers, 117 U.S.App.D.C. 306, 326 F.2d 653 (1963) assumed arguendo that there were distinctions between the two statutes. Judge Wright dissenting in Bates v. Rivers found important differences between the two statutes. The most important difference is the discretionary power of the U. S. Board to vary length of sentence -- as opposed to the nondiscretionary power of the Board in the District of Columbia. 323 F.2d at 313. This distinction was emphasized by the Ninth Circuit in Doherty v. United States, 280 F.2d 35 (9th Cir. 1960) which interpreted §4205 to allow the Parole Board to use its discretion in denying credit for time spent on parole. Section 24-206 permits no such discretion. "Thus the two statutes raise different problems." 323 F.2d at 314. Nevertheless, we will comment briefly on the cases involving §4205.

The cases sustaining §4205 proceed along a variety of theories -- none of which, appellant submits, can withstand constitutional scrutiny.

The "freedom theory" that holds that parole is not in custody has been dealt with in Part I of this brief. Despite the obvious fallacy of such a theory it has been used to support the denial of credit.

A second theory implicit in many of the cases sustaining denial of credit is the "contemplation theory!" This theory supposes that judges "contemplate" in their original sentence that a prisoner may serve an additional period in the custody of the parole board[12/]. If accepted, this

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12/ See, e.g., Woods v. Steiner, 207 F.Supp. 945 (D. Md. 1962)

theory would give prison authorities administrative discretion over sentences -- something which is clearly beyond constitutional limits. In this case, one would have to argue that the trial court "contemplated" custody for more than the maximum sentence provided in the statute, i.e., 15 years. The contemplation argument is extremely dangerous in view of its obvious lack of standards. It is an argument which, if accepted, could shelter just about any future action with respect to a prisoner.[13/]

A third theory sometimes used to support denial of credit is the "consent theory." Under this theory a prisoner wishing to be placed on parole consents to the imposition of further imprisonment if he violates pass conditions. The consent theory has a superficial appeal, but in practice appears ridiculous. In any event, if there is a constitutional right to credit, the waiver of such a right as a condition to parole appears invalid. See Garrity v. New Jersey, 385 U.S. 493 (1967).

In sustaining § 4205, the courts appear to have jumped from theory to theory without actually examining any of them in depth. Appellant respectfully suggests that this issue requires thorough and thoughtful con-

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13/ For example, it could be used to deny treatment in a mental institution on the ground that a trial judge knew, or "contemplated", that no such treatment was available. Similarly it could be used to deny religious freedom to prisoners or to permit beatings on the ground that a trial court "contemplated" that prison was a tough place.

sideration and may not be resolved merely through the citation of other cases. The courts have not hesitated to exercise their constitutional duties to strike down excessive punishments even where the legislature has spoken clearly. Where, as here, the legislative direction is unclear, it should not be extended to cover such a questionable result.

III. REVOCATION OF PAROLE AND SUBSEQUENT RETURN TO PRISON WITHOUT CREDIT FOR PAROLE IS A VIOLATION OF APPLICANT'S RIGHT OF DUE PROCESS

Appellant's parole was revoked on October 31, 1961 because he had used a car without permission and had failed to work regularly. Released on July 1, 1965 petitioner again had his parole revoked for reasons listed at p. 3. In neither case did the violations alleged constitute even the most minor crime.

As has been demonstrated above, revocation of parole accompanied by the denial of credit for time spent on parole results in the imposition of additional imprisonment. That a man who has committed no crime may be imprisoned pursuant to administrative action is so contrary to the state of our law that judicial authority is lacking.[14/] Nevertheless, this is the situation presented. On the basis of unsworn allegations of several acts, none of which are prohibited by any statute of the District of Columbia or of the United States, an administrative body has "sentenced" appellant to prison.

14/ Compare Palko v. Connecticut, 302 U.S. 319, 327 (1937).

Even if the alleged acts were somehow determined to be a sufficient basis for imprisonment, such imprisonment could not be imposed until after appellant had been tried and convicted in accordance with due process of law. It cannot be contended that such rights have been accorded appellant here. While appellant had certain rights in connection with his revocation hearing, these rights fall far short of those required before a person may be sentenced to imprisonment as compared to being required to return to prison on an existing sentence. For example, a parolee is not entitled to appointed counsel, may not cross-examine witnesses as a matter of right, and may not examine Board files or use compulsory process. See Hyser v. Reed, 115 U.S. App. D.C. 254, 318 F.2d 225 (1963).

When a prisoner fails to receive credit for the period he was on parole, he remains in custody for a period of time greater than that specified in his original sentence. It is thus obvious that the parole board's action results in the imposition of custody. Since this imposition occurs under procedures far less stringent than those required at trial, the parole board's action constitutes a denial of liberty without due process of law.

IV. D. C. CODE §24-206 IS UNCONSTITUTIONAL AS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE BECAUSE IT ARBITRARILY AND IRRATIONALLY PENALIZES A PAROLEE THE LONGER HE REMAINS OUT ON PAROLE WHEN PAROLE IS ULTIMATELY REVOKED.

The constitutional problem here is apparent from an example of two prisoners paroled after 5 years of a 10 year sentence. One spends four years on parole with no violations, then loses his job, begins drinking and has his parole revoked. He returns to jail for five years.[15/] The other spends one week on parole, loses his job and begins drinking. He returns to jail for five years and has lost only the one week on parole. It is evident the penalty for a parole violation increases each day the parolee is on parole. Both committed the same act, yet one had to not only serve his entire prison term, but also spend four years in custody while on parole. A statute which allows the above distinction is unconstitutional. It violates the Fifth Amendment, because the concept of Equal Protection is inherent in the right to Due Process. Bolling v. Sharpe, 347 U.S. 497 (1954).

15/ Revocation so close to final termination with subsequent return to jail for a long period is not unlikely. A situation not unlike the above occurred in Birch v. Anderson, 123 U.S. App. D.C. 153 358 F. 2d 520 (1965) where the Court refused to allow the Parole Board to send Birch back to jail for a short term (less than 180 days), when he had been released from jail for good conduct pursuant to 18 U.S.C. 4163 (mandatory release, credit for good conduct). The Parole Board tried to use 18 U.S.C. 4205 to revoke parole and give no credit, but the Court said Birch was not on parole, but on release.

As Chief Justice Warren said in Hernandez v. Texas, 347 U.S. 475, 478 (1954), "when the existence of a distinct class is demonstrated, and it is further shown that the laws as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated." The discrimination here is not only without justification, but is clearly the reverse of any logical scheme. The continually increasing penalty for a parole violation the longer the parolee remains free is arbitrary and capricious. We call the Court's attention again to the reasons petitioner had parole revoked:

(1) Odor of alcohol on breath on January 18, 1966

(2) Had not worked between February 15, 1966 and March 4, 1966

(3) Had not reported to parole office on three separate occasions as instructed

(4) Had not reported change of address

(5) Had not supported his wife since February 23, 1966

While one may criticize appellant's activities, none were criminal acts and are hardly serious enough to send him to jail for over three years. As one constitutional expert so aptly remarked 16/, "the duty of government . . . extends to the field of human rights and imposes an obligation to promote liberty, equality and dignity." In his view, it is now not enough to allow the law to stand, if "any slate of facts may reasonably be con-

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16/ Cox, Foreward: The Supreme Court, "Constitutional Adjudication and the Promotion of Human Rights," 80 Harv. L. Rev. 91, 93 (1966).

ceived to justify it." Equality can be achieved by crediting the parolee for time spent on parole.

V. CREDIT FOR TIME ON PAROLE WILL NOT INTERFERE WITH THE OPERATION OF THE PAROLE STATUTE.

While giving short shrift to the constitutional problems resulting from the denial of credit for time spent on parole, some courts have expressed concern that such credit would damage the operation of the parole system.[17/] Such concern appears ill founded.

No one questions the need for the Parole Board to have control over the conduct of a parolee and sanctions available to compel the type of conduct found desirable. Appellant's construction of the statute limits, but does not destroy, those sanctions.

If a parolee drinks, the Parole Board may revoke his parole and return him to prison for the remainder of lawful sentence. Thus, a person serving a 5-15 year sentence who is paroled after five years may be returned to jail for 10 years if he cannot resist a drink on the first day of his parole. True, if that drink is taken nine years later he may only be returned to prison for a year. However, absent a strong showing by the appellee to the contrary, this result would seem sufficient for the sound operation of the system. Of course, if the prohibited act is also a crime, society has the full remedies available to it under the criminal laws as well as the ability to return the prisoner to jail as a parole violator.

17/ See, e.g., Woods v. Steiner, 207 F. Supp 945 (D. Md., 1962)

CONCLUSION

For the above reasons, appellant seeks immediate release from prison, with full credit to his jail term for the amount of time spent on parole and for such other relief as the Court may deem appropriate.*

Respectfully submitted,

/s/ Brian C. Elmer

Brian C. Elmer
Attorney for Appellant
(Appointed by this Court)

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*In view of the fact that the relief requested by appellant would require the overruling of prior decisions of this Court, appellant respectfully suggests, pursuant to Rule 35 (d) of the Rules of Appellate Procedure, that a hearing in banc is appropriate.

APPENDIX A

PAROLE CONDITIONS IN THE DISTRICT OF COLUMBIA

STATEMENT OF THE CONDITIONS UNDER WHICH THIS PAROLE IS GRANTED

This Certificate of Parole shall not become operative until the following conditions are agreed to by the inmate:

1. That I will report immediately upon my release to the Washington Office of the Department of Corrections for my final instructions.

2. That I will not go outside the parole limits fixed in the Certificate of Parole without first obtaining the approval of my Parole Officer.

3. That I will, within the first week of each month until my final release, make upon the form provided a full and truthful written report to the Department of Corrections, 122 C Street, N.W., Washington, D.C., 20001, and mail it to my Parole Officer.

4. That I will not consume alcoholic beverages to excess; That I will totally abstain from the use of alcoholic beverages; (Strike one of the foregoing clauses); and that, furthermore, I will not visit places where alcoholic beverages are sold, dispensed, or used unlawfully.

5. That I will not purchase, possess, use, or administer marihuana or narcotic or other habit-forming or dangerous drugs, unless their use is prescribed or advised by a physician; and that I will not visit places where such drugs are illegally sold, dispensed, used or given away.

6. That I will not, during the term of my supervision, associate for unlawful or negative reasons with any person or persons having a criminal record or a bad reputation.

7. That I will secure the written permission of my Parole Officer before purchasing or operating a motor vehicle.

8. That I will not own, possess, use, sell, or have under my control any deadly weapon or firearms.

9. That I will in all respects conduct myself honorably, make diligent efforts to find and maintain legitimate employment, and support myself and my family to the best of my ability during the period of my supervision.

10. That I will not change my place of residence or employment without first obtaining the approval of my Parole Officer; that I will keep my Parole Officer informed at all times as to where I reside and work; and that in the event I should lose my employment or have to change my place of residence, I will immediately notify my Parole Officer.

11. That I will promptly and truthfully answer all inquiries directed to me by the Board of Parole and those responsible for my supervision, and cooperate to the best of my ability with such persons; and that I will carry out the instructions of my Parole Officer and will report as he directs.

12. That I will not marry without consulting and obtaining the permission of my Parole Officer; nor will I live in a marital relationship with any person to whom I am not legally married.

13. That I will not enter into any agreement to act as an "informer" or special agent for any law enforcement agency.

14. That I will live and remain at liberty without violating the law, and report immediately to my Parole Officer any arrest or serious difficulty in which I may become involved.

15. That I recognize I am subject, during my release and supervision, to a specified plan and that failure to observe or carry out such plan in any essential particular may, in the discretion of the Board of Parole, be sufficient cause to return me to the institution.

I have read or had read to me the conditions of parole; and I do solemnly promise and agree to abide by the foregoing conditions and hereby acknowledge that my failure to comply with any one of them may be considered a violation of my parole for which I am subject to be returned as a parole violator.

DATE: _____ SIGNATURE: _____

WITNESS: _____ REGISTER NUMBER: _____

APPENDIX B

LEWIS E. JOHNSON

CHRONOLOGY

Date	Event	Time in Prison	Time in Custody
June 11, 1953	Sentenced to 4-12 years		
October 16, 1958	Paroled	5 yrs. -4 mos.	5 yrs. -4 mos.
October 31, 1961	Returned to prison	5 yrs. -4 mos.	8 yrs. -4 1/2 mos.
July 1, 1965	Paroled	9 yrs.	12 yrs.
March 4, 1966	Violater warrant	9 yrs.	12 yrs. -11 mos.
July 22, 1968	Returned to prison	9 yrs.	12 yrs. -11 mos. *
December 13, 1970	Mandatory release**	11 yrs. -5 mos.	15 yrs. -3 mos.
January 16, 1971	Sentence expires**	11 yrs. -6 mos.	15 yrs. -4 mos.

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* Appellant does not at this time contend that the time between March 4, 1966 and July 22, 1968 was time spent in custody.

** Under the appellee's contention.